IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2006-0436
Appellee,	)	DEPARTMENT A
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
SAMUEL ANTONIO PARRA,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20042732

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Jonathan Bass — Tucson
Attorneys for Appellee

Matthew H. Green — Tucson
Attorney for Appellant

H O W A R D, Presiding Judge.

¶1 After a jury trial, appellant Samuel Parra was convicted of sexual abuse of a minor under eighteen, two counts of attempted sexual conduct with a minor, molestation of

a child, sexual conduct with a minor under fifteen, and sexual abuse of a minor under fifteen. The trial court sentenced Parra to a total of thirty-seven years' imprisonment. On appeal, Parra argues the trial court erred in admitting certain evidence, failing to investigate an allegedly sleeping juror, and denying his motion for mistrial. We find no error and affirm Parra's convictions and sentences.

Facts

¶2 "'We view the facts in the light most favorable to sustaining the convictions.'" *State v. Simpson*, 217 Ariz. 326, ¶ 2, 173 P.3d 1027, 1028 (App. 2007), *quoting State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). Over a period of years, Parra engaged in repeated acts of sexual conduct with his stepdaughter, Sarah H., who was either fifteen or younger at the time of the incidents. Parra's actions included fondling Sarah sexually in the home when no one else was around, rubbing his genitals on her back, placing her hand on his genitals, and forcing her to perform an act of oral sex on him. A final incident occurred one morning when Sarah was lying in bed. Parra entered her room and rubbed her body under the covers but over her clothes. He left and then returned a short time later. This time he reached under the covers and under her clothing; touched her in various places, including between her legs; and kissed her on the back. When he left the room the second time, Sarah called 911 and reported what he had done. After an investigation, Parra was charged with and convicted of multiple counts of sexual abuse and sexual conduct stemming from these incidents. He now appeals those convictions.

Admitting Tape Recording of the 911 Call

¶3 Parra first claims the trial court erred by admitting a recording of Sarah's 911 call. He concedes the evidence was relevant but argues, pursuant to Rule 403, Ariz. R. Evid., that the probative value was outweighed by prejudice.

¶4 We review a trial court's ruling on the admissibility of evidence with respect to Rule 403 balancing for an abuse of discretion. *See State v. Ramsey*, 211 Ariz. 529, ¶ 31, 124 P.3d 756, 767 (App. 2005); *State v. Cañez*, 202 Ariz. 133, ¶ 61, 42 P.3d 564, 584 (2002). When assessing whether the court abused its discretion we view the evidence in the light most favorable to the state, which was the proponent of the evidence. *See Ramsey*, 211 Ariz. 529, ¶ 36, 124 P.3d at 768.

¶5 Under Rule 403, a trial court may exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice." "[N]ot all harmful evidence is unfairly prejudicial." *State v. Lee*, 189 Ariz. 590, 599, 944 P.2d 1204, 1213 (1997). Unfair prejudice occurs "'if the evidence has an undue tendency to suggest decision on an improper basis, such as emotion, sympathy, or horror.'" *Id.* at 599-600, 944 P.2d at 1213-14, *quoting State v. Mott*, 187 Ariz. 536, 545-46, 931 P.2d 1046, 1055-56 (1997).

¶6 Parra challenges the admission of the tape recording of the 911 telephone call that Sarah made on the day that Parra entered her room and touched her sexually while she was lying in bed. Parra objected to the admission of the tape recording on the grounds that the jury should not be allowed to hear Sarah's tone of voice and use it to determine that the

abuse actually occurred. He argued that the prejudice of playing the tape outweighed its probative value and requested that a transcript of the call be admitted instead. The state argued the tape was admissible as an excited utterance and was the "best evidence" of Sarah's emotional state at the time of the event and that it was relevant to Sarah's credibility. It contended Parra would claim the accusations had been fabricated or misrepresented and that Sarah's credibility as a child was at issue. The court overruled the objection, permitting the tape to be played and to be admitted as an exhibit.

¶7 Parra argues it was unduly prejudicial to allow the jury to hear the "fear [and] sorrow" in Sarah's voice. We have reviewed the tape and, although this evidence may have been harmful to Parra, the trial court reasonably could have found that hearing Sarah's voice during the call would assist the jury in evaluating her credibility and that this outweighed any danger of unfair prejudice. *See Lee*, 189 Ariz. at 599-600, 944 P.2d at 1213-14; *see also Cañez*, 202 Ariz. 133, ¶ 61, 42 P.3d at 584 (reasonable to conclude "jury's credibility determination would be aided by hearing [speaker's] demeanor" in tape-recorded statement).

Testimony Regarding Siblings

¶8 Parra next claims the court erred in overruling his objection to Sarah's testimony that her half-siblings, Samantha and Alex, were no longer allowed to see Parra.[1]

[1]Parra is the biological father of both Samantha and Alex and the stepfather of Sarah. Sarah's mother is the biological mother of all three children.

He argues the probative value of this testimony was outweighed by its prejudicial effect. Parra cites the following testimony:

> Q Do Alex and Samantha get to see the defendant anymore?
>
> A Not really.
>
> Q How do they feel about that, if you know?
>
> [Defense Counsel]: Object to the relevance of that, Your Honor.
>
> The Court: Overruled.

The above excerpt shows that Parra did not object to the question of whether Alex and Samantha could still see Parra. He objected to how they felt about not seeing him. Moreover, even if we read the above objection as going to the first question, the basis of that objection was relevancy, not that the testimony was unduly prejudicial. Because Parra did not object to the first question, and because he did not raise the issue of prejudice at all, he has forfeited his claim regarding this testimony, absent fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005); *see also State v. Ruggiero*, 211 Ariz. 262, ¶ 22, 120 P.3d 690, 695 (App. 2005) (failure to object on Rule 403 grounds waives the objection). Fundamental error is "'error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984).

"To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Id.* ¶ 20.

¶9 Parra does not argue that admission of the testimony was fundamental error. He also fails to adequately cite any pertinent legal authority. Parra has not met his burden of establishing fundamental error. *See id.* ¶¶ 19-20.

Investigation of Juror Misconduct

¶10 Parra argues the trial court erred in failing to investigate his claim that a juror had been sleeping during trial. But, Parra's trial counsel merely stated that someone had "pointed out to [him]" that a juror "might" be sleeping. He asked the court to "start watching" but did not suggest any other curative action was appropriate.

¶11 This court has held that, where defense counsel and the court saw a juror sleeping during trial and defense counsel "refus[ed] to take curative action" at trial, the defendant could not claim error on appeal. *State v. Spratt*, 126 Ariz. 184, 187-88, 613 P.2d 848, 851-52 (App. 1980). Similarly, Parra did not suggest curative action beyond asking the court to "start watching," but he now suggests the court should have done more. We review this issue solely for fundamental error. *See State v. Spears*, 184 Ariz. 277, 288, 908 P.2d 1062, 1073 (1996). As explained above, Parra bears the burden of proving both fundamental error and prejudice. *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607. But Parra neither argues that any fundamental error occurred with respect to this issue, nor claims prejudice. Therefore, he has failed to carry his burden. *See id.*

Foundation for Expert Testimony

¶12 Parra contends the trial court erred in permitting the state's expert, Wendy Dutton, to testify about the following three topics: (1) the difficulty child abuse victims may have in recalling specific details of an event after attempting to "block out" the event; (2) the unwillingness of certain children to discuss specific words or acts related to abuse; and (3) the likelihood that an adolescent abuse victim might be more comfortable talking about fondling than acts of oral sex or penetration. Parra contends the state failed to elicit sufficient foundation for Dutton's testimony. We review a trial court's decision on the foundation for expert testimony for an abuse of discretion. *State v. Roscoe*, 184 Ariz. 484, 493, 910 P.2d 635, 644 (1996).

¶13 Rule 702, Ariz. R. Evid., provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise." To establish foundation for expert testimony, the state had to "elicit testimony establishing the methods, facts, or data" on which the testimony was based. *State v. Bolton*, 182 Ariz. 290, 304, 896 P.2d 830, 844 (1995). This court has held that common behavioral characteristics of childhood sexual abuse victims is a proper area for expert testimony. *State v. Curry*, 187 Ariz. 623, 628-29, 931 P.2d 1133, 1138-39 (App. 1996).

¶14 Dutton's testimony was based on her many years of experience as a licensed professional counselor and forensic interviewer, her familiarity with the research in the area and her additional experience as a teacher in the area. She has interviewed child victims or witnesses thousands of times and has testified as an expert witness over 100 times. More specifically, Dutton's testimony on the effect of "blocking out" on memory and the discomfort some children have with describing certain acts was based on her experience interviewing victims and witnesses as well as her familiarity with the relevant literature. Her testimony about the possibility that some adolescent victims might be more comfortable discussing certain acts than others was based on her experience. This provided a sufficient basis for Dutton's testimony.

¶15 Citing *Bolton*, Parra nevertheless argues Dutton should have been required to specify the literature she relied on in stating her expert opinion. In *Bolton*, the sole basis for a detective's purported expert opinion regarding the "'phenomenon' that some child sex murderers try to restore their victims" was his statement that he had "heard it spoken of." 182 Ariz. at 304-05, 896 P.2d at 844-45. The court held that there was insufficient foundation for the detective's opinion. *Id.* at 305, 896 P.2d at 845. Here, Dutton testified at length about her experience and noted that she keeps up with literature on child development. Parra cites no authority—nor are we aware of any—requiring an expert, in the absence of cross-examination on the issue, to list by name the literature on which she bases her opinion. Moreover, as noted above, Dutton's testimony was not based solely on

the literature she had reviewed, but also on her experience interviewing victims and witnesses. *See Logerquist v. McVey*, 196 Ariz. 470, ¶ 30, 1 P.3d 113, 123 (2000). The court did not abuse its discretion in concluding there was sufficient foundation for Dutton's testimony.

DNA Testimony

¶16 Parra next argues the trial court erred in overruling his objection to a criminalist's testimony regarding "inconsistent" DNA findings and the admission of a summary of those findings. But a review of the record shows that Parra withdrew his objection after the state further explained the DNA findings during a bench conference. Parra has therefore forfeited this issue absent fundamental error. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607; *State v. Castro*, 163 Ariz. 465, 475, 788 P.2d 1216, 1226 (App. 1989) (party waives issue by renouncing objection). Again, as discussed above, Parra has the burden to show both fundamental error and resulting prejudice. *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607.

¶17 Again Parra does not argue the purported error here was fundamental. He only suggests that "[i]nconclusive and inconsistent findings of DNA analyses may prejudice the defendant by cultivating confusion and inviting speculation by the jury." Parra relies on one case that is both factually and legally distinguishable and provides no other argument or relevant legal authority in support of this issue. Parra has failed to meet his burden to establish either fundamental error or prejudice. *See id.*

Misconduct During Closing Argument

¶18 Parra last argues the prosecutor unfairly prejudiced him with remarks regarding the defense attorney during closing argument and that the court erred in denying his motion for mistrial on these grounds. We review the trial court's decision to deny a mistrial for an abuse of discretion. *See State v. Turrentine*, 152 Ariz. 61, 67, 730 P.2d 238, 244 (App. 1986). "Attorneys, including prosecutors in criminal cases, are given wide latitude in their closing arguments to the jury." *State v. Comer*, 165 Ariz. 413, 426, 799 P.2d 333, 346 (1990). When a prosecutor makes an improper comment during closing argument, we will not find an abuse of discretion unless we conclude the remarks probably influenced the jury's verdict. *See Turrentine*, 152 Ariz. at 67, 730 P.2d at 244.

¶19 During closing argument, the prosecutor suggested that Samantha's trial testimony regarding the lengths of time that Parra spent in Sarah's bedroom on the morning she called 911 was inconsistent with her earlier statements to investigators. The prosecutor stated that "Samantha didn't say anything about the longer time being first or second, . . . until she met with [Parra's counsel] this year." Parra reserved an objection and, during a later bench conference, argued this comment inappropriately suggested Parra's counsel had tricked Samantha into changing her statement. The court treated Parra's objection as a motion for mistrial and denied it, finding the comment did not prejudice Parra and did not imply Parra's counsel had engaged in inappropriate questioning.

¶20 The goal of the prosecutor's comment appears to have been merely to point out that Samantha's statements to the investigating officers were much closer in time to the incident than her interview or her trial testimony. And during Samantha's testimony, both Parra's counsel and the prosecutor specifically referred to what Samantha had said during the interview. The prosecutor's comment during closing argument can fairly be regarded as doing nothing more than pointing out facts relevant to the credibility of Samantha's various statements. In any event, to the extent the prosecutor's comment may have been improper, Parra does not explain how it might have influenced the jury other than to suggest, rather implausibly, that it appealed "to the fears or passions of the jury." We conclude that this isolated comment, which was at worst ambiguous, did not influence the verdict and therefore the court did not abuse its discretion in denying Parra's motion for mistrial. *See Turrentine*, 152 Ariz. at 67, 730 P.2d at 244.

Conclusion

¶21 Based on the foregoing, we affirm Parra's convictions and sentences.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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J. WILLIAM BRAMMER, JR., Judge